Office-Supreme Court, U.S.
FILED
DEC 3 1965
JOHN F. DAVIS, CLERK

(38,211)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 718

ATLANTIC GULF & PACIFIC CO.,
Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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INDEX

	PAGE
Preliminary Statement	1
Statutes Involved	3
Statement of the Case	3
The Facts	4
Argument:	
The imposition of the City's use tax with respect to property used in New York City does not violate the Commerce Clause simply because the City's tax law does not give credit for sales or use taxes paid to other jurisdictions where the property was first used when applied in a case where no such tax was paid or incurred to such other jurisdictions	5
Conclusion	7

CASES CITED

Darnell v. *Indiana*, 226 U. S. 390 (1912)	7
Hatch v. *Reardon*, 204 U. S. 152 (1907)	7
Henneford v. *Silas Mason Co.*, 300 U. S. 577 (1937)	5
Premier Pabst Co. v. *Grosscup*, 298 U. S. 226 (1936)	7
Southern Pacific Co. v. *Gallagher*, 306 U. S. 167 (1939)	6

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Preliminary Statement

The appellant has appealed from a final order of the Court of Appeals of the State of New York, dated June 10, 1965, affirming an order of the Appellate Division of the Supreme Court of that State.

The opinion of the Court of Appeals is reported in 16 NY 2d 1, 209 N. E. 2d 86, and its text is set forth in Appendix I of the appellant's jurisdictional statement (p. A-1). The memorandum opinion of the Appellate Division is officially reported in 18 AD 2d 979, and its text is set forth in Appendix II of that statement (p. A-8).

By this appeal the appellant challenges the constitutional validity of the New York City Compensating Use Tax law when applied to the use in New York City of property purchased and first used outside of New York City. Under this law, such property is subjected to a tax based upon its depreciated value when used in New York City.

It will be seen from the opinion below that the primary thrust of appellant's original attack on the tax determination was based on the view that the use tax law, properly interpreted, did not impose a tax on the use of property purchased and first used outside New York. Its claims of unconstitutionality were secondary and alternative and required consideration only if it failed (as it did) in its interpretative argument. Several of its constitutional arguments were bottomed on the supposition that the tax was based on cost price, not value, a view which appellant insisted the law compelled, but which the Court below rejected (Applts. Juris. Stm't pp. A-4 and A-5). Hence, only one constitutional argument survives the state proceedings, and that argument is the basis for this appeal.

Specifically, appellant contends that the failure of the Use Tax Law to allow a credit against the tax for sales or use taxes paid in other jurisdictions* results in a threat of potential multiple tax burdens which violates the Commerce Clause of the United States Constitution even where, as in this case, no such other tax was paid or incurred (Jurisdictional Statement pp. 8, 9).

This motion to dismiss is made on the ground that the issue raised does not present a substantial federal question.

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* Effective July 1, 1964 the New York City Use Tax law was amended to allow credit (on a reciprocal basis) for taxes actually paid to other jurisdictions (Local Law No. 40 of 1964, adding par. 10 to Admin. Code § M46-17.0). The present New York State and the New York City use tax laws contain similar provisions. N.Y. Tax Law, § 1118(7); Administrative Code of the City of New York, § A46-11.0(7).

Statutes Involved

The provision of the New York City Use Tax Law relevant to this appeal (Administrative Code, § M46-16.0, subds. a and b) is set forth in Appendix III of the Jurisdictional Statement.

Statement of the Case

This proceeding was instituted under the provisions of Article 78 of the Civil Practice Act of the State of New York to review a final determination of the appellee, as Comptroller of the City of New York, which determined tax to be due under the New York City Compensating Use Tax law in the amount of $33,088.58 plus penalty interest of $12,880.29 for the period September 1, 1954 to August 31, 1956.

The determination under review here was issued after a statutory hearing held by the Comptroller of the City of New York at which evidence was adduced and testimony given by appellant and appellee, both having appeared by counsel at such hearing.

Under New York practice the administrative hearing constitutes the trial of the issues in the case (Article 78, N. Y. Civil Practice Act; Article 78, N. Y. Civil Practice Law and Rules). The determination issued in this case after the hearing was initially reviewed by the Supreme Court of the State of New York, Appellate Division, First Department, which unanimously confirmed it. Upon appeal by appellant to the Court of Appeals of the State of New York that court affirmed, with one judge dissenting on non-constitutional interpretative grounds. (Appendix to Applt's Jurisdictional Statement, pp. A-1—A-8).

The Facts

The appellant, a West Virginia corporation (fol. 97) with its principal and home office in New York City (fols. 218-224, 340-341, 347), engaged in the dredging of waterways for government and industry (fols. 82, 89).

In April of 1946 appellant arranged for the construction in Maryland of a dredge, the Barlow, which was delivered to it in Virginia in December 1948 (fols. 167, 113). The dredge was registered with the U. S. Coast Guard as of December 12, 1948, with New York City designated as its home port (fol. 345, City's Exh. G.), and it was put to work in South Carolina, Florida, and Virginia (fols. 115-117).

On July 23, 1956, the Barlow was towed into New York City waters where she was used to perform a dredging and filling contract for the City of New York and a land filling contract for a local real estate developer (fols. 117, 144-146, Applt's Exhs. 6 & 7).

Certain equipment used in connection with the dredge, consisting of pipe to make up a line to carry the dredged material to shore and pontoons on which the pipe was floated, was also brought into New York City during the period covered by the tax determination. This equipment also had been first used in another jurisdiction (fols. 295, 312-323, 349-351).

No sales tax or use tax was paid to any other jurisdiction with respect to the dredge Barlow (fols. 343, 374-375). Having been taken to Virginia for delivery, no Maryland sales or use tax became due on its sale. There is no evidence that any such tax was paid or incurred on the other equipment involved in this case.

Appellant omitted the items in issue from its New York City use tax returns. The appellee applied the tax based on their market value at the time of their use in New York City (fols. 541-551).

ARGUMENT

The imposition of the City's use tax with respect to property used in New York City does not violate the Commerce Clause simply because the City's Tax Law does not give credit for sales or use taxes paid to other jurisdictions where the property was first used when applied in a case where no such tax was paid or incurred to such other jurisdictions.

The appellant's sole contention is that the New York City Use Tax Law, as applied to the use of its dredge and dredging equipment, is invalid under the Commerce Clause because it poses the possibility of multiple taxation in that similar taxes might be imposed by each state into which the taxed property moves.

This Court has twice discussed an identical contention. It has stated that the imposition of a use tax is not invalid merely because the property had previously been used in another jurisdiction which might have, but did not, impose a sales or use tax.

In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937), this Court upheld the applicability of the Washington use tax statute which gave credit for sales and use taxes paid in other states. The Court was careful to point out that it was not saying that such a credit or offset was necessary to prevent discrimination against interstate commerce. To forestall the very misconception which lies at the root of petitioner's argument here, Mr. Justice CARDOZO pointedly stated (p. 587):

> "Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere.

> If there are limits to that power, there is no need to mark them now. *It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.*" (Italics ours.)

In *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167 (1939), the same issue arose under a use tax law which provided no credit for sales or use taxes paid in another state. This Court upheld the California use tax on property purchased elsewhere and then brought into California, saying (pp. 171-172):

> "The principle of the use tax as applied to property brought into the state after its retail purchase for intrastate use has been upheld in *Henneford* v. *Silas Mason Co.,* against the charge that it was a tax upon the operations of interstate commerce or a tax upon a foreign sale, violative of the Fourteenth Amendment. Under the Washington statute, there considered, discrimination against interstate commerce, arising from a second exaction for use after a foreign tax on sale, could not exist as provision was made for a credit against the local tax of any such foreign levy. No such problem arises here by evidence, finding or assignment of error even though the California Act does not have this provision. It will be time enough to resolve that argument 'when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.' "

Appellant seeks to minimize the import of this Court's two pronouncements by pointing out that in neither of the two cases, was the issue squarely raised. It points out that there was a credit for out-of-state taxes in the Washington statute involved in the *Henneford* case (Applt's Juris. Stm't p. 15) and that in the *Southern Pacific* case, where no such credit was provided by the statute, the issue was not before the court by assignment of error.

The clear language of this Court in both the *Henneford* and *Southern Pacific* cases, whether holding or *obiter dicta,* is but a reiteration of the fundamental rule that an attack on the constitutionality of a law must be made by one who

is injured by the feature of the law under attack. *Hatch* v. *Reardon,* 204 U. S. 152, 160-161 (1907); *Darnell* v. *Indiana,* 226 U. S. 390 (1912); *Premier Pabst Co.* v. *Grosscup,* 298 U. S. 226 (1936).

Here, as in the *Southern Pacific* case, appellant has not been burdened by a second use or sales tax. The time is not ripe for its claim of multiple taxation; it may be when another jurisdiction refuses to credit it with the New York City tax here in issue.

Appellant seems to concede that the inclusion of a provision in the New York City Use Tax Law giving a credit for taxes paid to other jurisdictions would save the law's constitutional applicability to it. In this regard it points with apparent approval to such a proposed solution contained in H. R. 11798, [§ 302(b)], a bill prepared after a Congressional study of the impact of State taxes on interstate commerce. Yet, if there had been such a credit, it would have given appellant no comfort. It would have remained subject to the tax as imposed.

CONCLUSION

The appeal from the order of the Court of Appeals of the State of New York should be dismissed.

December 1, 1965.

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